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No. 97-241

In the Supreme Court of the United States

OCTOBER TERM, 1997

ZOLLO DRUM COMPANY, INC. AND
NRS CARTING COMPANY, INC., PETITIONERS

v.

B.F. GOODRICH CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether corporate successor liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, is governed by federal or state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-62a) is reported at 99 F.3d 505. The opinion of the court of appeals denying a petition for rehearing (Pet. App. 84a-87a) is reported at 112 F.3d 88. The opinion of the district court (Pet. App. 63a-83a) is reported at 840 F. Supp. 180.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 1996, and a petition for rehearing was denied on April 25, 1997 (Pet. App. 84a-87a). The petition for a writ of certiorari was filed on July 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, "is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted that statute to address concerns over the severe environmental and public health effects from releases of hazardous substances, especially at abandoned and inactive waste disposal sites. See H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 22 (1980).

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104(a) authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604(a).[1] Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106(a) grants the President authority to issue orders, or to seek judicial injunctive relief, to compel persons to respond to releases or threats of release. 42 U.S.C. 9606(a).

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[1] CERCLA grants authority to the President, who has delegated most of the authority for administering CERCLA to the Administrator of the Environmental Protection Agency. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987), *reprinted in* 42 U.S.C. 9615 note.

CERCLA also provides a mechanism for financing government-initiated cleanups of sites that contain hazardous substances. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. The United States may then bring judicial actions against responsible parties under Section 107 to recover "all costs of removal and remedial action" and replenish the Superfund. 42 U.S.C. 9607(a)(4)(A). Section 107 also allows parties other than the federal government to recover "necessary costs of response" in certain circumstances, while Section 113 allows liable parties to seek contribution from other liable parties. See CERCLA § 107(a)(4)(B), 42 U.S.C. 9607(a)(4)(B); CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that Congress has determined justify the imposition of liability. Section 107 requires a showing that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for response

costs. They are: (1) current owners and operators of a facility at which there has been a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of disposal of a hazardous substance; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and (4) persons who selected the site and transported hazardous substances to the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4). The statute defines "person" to include, *inter alia*, a "firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity * * *." 42 U.S.C. 9601(21).

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chems.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer*, 889 F.2d at 1507; *Aceto Agric. Chems.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. Responsible parties may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1). See *R.W. Meyer*, 889 F.2d at 1507; *Monsanto*, 858 F.2d

at 173; see also H.R. Rep. No. 253, 99th Cong., 2d Sess. Pt. I, at 79 (1986).

2. This action arises from efforts to clean up contamination at the Beacon Heights and Laurel Park landfill sites in Connecticut, both of which are listed on the NPL. In 1987, the United States filed suit against Terrance and Harold Murtha, who owned and operated the two landfills. The State of Connecticut's Department of Environmental Protection, the Uniroyal Chemical Company, Inc., and a coalition of corporations led by B.F. Goodrich Company also filed CERCLA actions against the Murthas. The Murthas filed third-party actions for contribution or indemnification against some 200 third-party defendants, including petitioners, who, the Murthas alleged, had generated or transported hazardous substances found at the landfills. See Pet. App. 5a.

In September 1987, the EPA entered into a consent decree for remediation of the Beacon Heights site. A group called the Beacon Heights Coalition, which consisted of 33 potentially responsible parties who had generated hazardous substances deposited at the Beacon Heights landfill, agreed to clean up the site and to reimburse EPA for certain future oversight costs. The Beacon Heights Coalition members who had brought suit against the Murthas also settled those actions. Under the settlement, the Murthas paid $1,875,000 to the Beacon Heights Coalition and assigned their third-party claims to the Coalition. A similar coalition was formed and a similar agreement was reached with respect to the Laurel Park site. Pet. App. 5a-7a.

In April 1992, following litigation over the status of municipal waste generators, the district court, *sua sponte*, decided to allow all of the parties in the

litigation to file motions for summary judgment. Most of the original third-party defendants, including petitioners, filed such motions. The Beacon Heights and Laurel Park Coalitions opposed the motions and cross-moved for summary judgment. At that point in the litigation, the court had effectively restricted discovery to a set of court-drafted interrogatories. In December 1992, after initially denying a request for expanded discovery, the district court allowed limited deposition discovery. Pet. App. 7a-8a.

The district court ruled on the summary judgment motions in a series of orders beginning in December 1993. Pet. App. 8a, 66a-83a. In those orders, the court ultimately granted summary judgment to nearly all third-party defendants who sought that relief, and it dismissed, *sua sponte*, nearly all of the remaining defendants, including many that did not request that relief. *Id.* at 8a. The court granted summary judgment to petitioners, as well as certain other third-party defendants, based on its assessment that they were not corporate successors of liable parties. *Id.* at 79a, 82a.[2]

The court did not articulate a specific standard for determining corporate successor liability. Rather, the court made brief findings as to each of those defendants, sometimes noting whether there was an identity of officers, directors, or shareholders between the predecessor and successor entities. See Pet. App. 67a (stating as to Axil Corporation that "[t]here was never any identity of officers, directors or shareholders between the two corporations"); *id.* at

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[2] The United States did not assert cost recovery claims against petitioners or seek to impose successor liability against any of the other parties.

80a (stating as to Seymour Brass, Inc., that "[t]here is no showing of identity").

In the case of petitioner NRS Carting Company, Inc. (NRS), the court's findings state in their entirety that:

> [The Beacon Heights Coalition] alleges successor liability in movant for the disposal of used tires by Norwalk Service, Inc. No meaningful memorandum has been submitted by the coalitions. As discussed above as to disposal of tires and successor liability, and for the further reason that movant has shown, without contradiction that it came into existence after the disposal by Norwalk Service, Inc. and only purchased limited assets of Norwalk Service, Inc., the motion is granted.

Pet. App. 79a.[3] In the case of petitioner Zollo Drum Company, Inc. (ZDC), the court's findings state in their entirety that:

> This [third-party defendant] was incorporated in 1984, after [the Beacon Heights landfill] was closed. A prior sole proprietorship was conducted under a comparable name by Richard Zollo. Richard sold the business and related assets to ZDC on December 13, 1984. Anthony Zollo, son of Richard, is president of ZDC. Stock ownership, officerships and directors have not otherwise been put into the record. As a distinct entity is

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[3] The court's reference to its prior discussion "as to the disposal of tires" apparently refers to its holdings for Derby Tire Co., Inc., and Meyers & Schwartz, Inc., granting summary judgment to those third-party defendants on issues other than successor liability. See Pet. App. 70a-71a.

> involved and [the Beacon Heights Coalition] has not cited convincing authority for its claim of successor liability, ZDC's motion is granted. The coalitions' motion is denied.

Id. at 82a.[4]

3. The United States, the State of Connecticut, and the Coalitions appealed various aspects of the district court's judgment. The court of appeals affirmed in part, reversed in part, and remanded. The court vacated all grants of summary judgment premised on the absence of successor liability, including those of petitioners, and remanded the case for further proceedings. Pet. App. 49a.

The court concluded that CERCLA subjects the successors of liable parties to CERCLA liability. Pet. App. 19a-20a. The court noted that CERCLA imposes liability on any "person" falling within the four specified categories, CERCLA § 107(a), 42 U.S.C. 9607(a), and that CERCLA defines the term "person" to include a "corporation, association, partnership, consortium, joint venture, [or] commercial entity," CERCLA § 101(21), 42 U.S.C. 9601(21). Pet. App. 20a. Under federally codified provisions of statutory construction, the words company or association "shall be deemed to embrace the words 'successors and assigns of such company or association.'" 1 U.S.C. 5. The court of appeals accordingly concluded that "CERCLA's statutory language, properly read, provides for successor liability." Pet. App. 20a.

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[4] In addition to petitioners, the court granted summary judgment, rejecting claims of successor liability, to Axil Corporation (Pet. App. 66a-67a); Connecticut Pharmacare (*id.* at 68a); Sanitary Refuse Company, Inc. (*id.* at 69a-70a); Jacob Brothers, Inc. (*id.* at 72a); and Seymour Brass, Inc. (*id.* at 80a).

The court of appeals observed that a "number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability law of a given state." Pet. App. 20a-21a. The court also observed that, under the "traditional common law rule," a corporation acquiring the assets of another assumes its liabilities only if "the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a *de facto* merger or consolidation; the successor is a 'mere continuation' of the predecessor; or the transaction is fraudulent." *Id.* at 21a. The court noted that "[b]oth sides agree that this is the standard." *Ibid.*

The parties disagreed, however, over what constitutes a "mere continuation" of the predecessor. Petitioners advocated an "identity" test, requiring "the existence of a single corporation after the transfer of assets, with an identity of stock, stockholders, and directors between the successor and predecessor corporations." Pet. App. 21a. The Coalitions advocated a "substantial continuity" rule, requiring an assessment of whether the successor "maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers." *Ibid.* The court concluded that, "[b]ecause the substantial continuity test is more consistent with the Act's goals, it is superior to the older and more inflexible 'identity' rule." *Id.* at 22a.

The court of appeals conducted a case-by-case review of the grants of summary judgment in an appendix to its opinion. See Pet. App. 49a-62a. In the case of grants involving successor liability, the court

stated that "the district court should reconsider its decisions in light of today's opinion" and that, "[s]hould any material facts remain genuinely disputed, summary judgment should not be granted." *Id.* at 49a. In the case of petitioner NRS, the court of appeals specifically noted, "NRS's contention that it was not a successor to Norwalk Refuse Service (Norwalk), but only purchased some commercial customer routes, equipment, and containers from Norwalk, presents a fact question regarding successor liability." *Id.* at 50a. In the case of petitioner ZDC, the court of appeals merely noted that the district court had "rejected the Beacon Heights Coalition's argument that ZDC should be liable for the acts of a prior sole proprietorship operated by Richard Zollo (Anthony's father) which was later sold to ZDC." *Ibid.*[5]

Petitioners sought rehearing, explicitly challenging for the first time the use of a federal rule of successor liability. Compare Appellees' C.A. Br. 24-31 with Pet. for Rehearing 1-11. The court of appeals denied rehearing in a published order. Pet. App. 84a-87a. The court clarified that the determination whether to apply a federal rule of successor liability depends on whether: (1) the issue requires a nationally uniform body of law; (2) application of state law would frustrate specific objectives of the federal

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[5] The court of appeals' appendix also specifically addresses the summary judgments granted on the successor liability issue to Jacob Brothers (Pet. App. 49a), Seymour Brass (*ibid.*), and Connecticut Pharmacare (*id.* at 50a). The court does not address the summary judgments granted to the Axil Corporation or the Sanitary Refuse Company, Inc. (see note 4, *supra*) in the appendix, but does mention the latter company in the main body of its opinion (Pet. App. 18a-19a).

program; and (3) a federal rule would disrupt commercial relationships predicated on state law. *Id.* at 86a (citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 728-729 (1979)). The court stated that its decision to adopt the "substantial continuity" test was consistent with the *Kimbell Foods* test because "there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of 'substantial continuity' will unduly upset existing corporate relationships." *Id.* at 87a.

ARGUMENT

Petitioners argue that this Court should grant certiorari to determine whether the court of appeals erred in instructing the district court to apply the "substantial continuity" test when determining successor liability under CERCLA. They assert that the courts of appeals are divided on the issue (Pet. 10-15), and that the conflict has produced an "unacceptable degree of uncertainty" on an "important and recurring" issue (Pet. 15-22). The United States, which does not seek cost recovery based on successor liability in this case, took no position on the question of successor liability before the court of appeals. We agree that the issue has divided the lower courts. This case, however, does not present an appropriate occasion to resolve the question.

1. The courts of appeals have not reached a consensus on the question of successor liability under CERCLA. The court of appeals' decision in this case is consistent with the decisions of the Third, Fourth, and Ninth Circuits, which have held that successor liability under CERCLA should be governed by a

uniform federal rule. *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); *United States* v. *Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992); *Louisiana-Pacific Corp.* v. *Asarco, Inc.*, 909 F.2d 1260, 1262-1263 (9th Cir. 1990).[6] The court of appeals' decision is also consistent with a decision of the Eighth Circuit, which indicated that use of a federal rule "was probably" appropriate. See *United States* v. *Mexico Feed & Seed Co.*, 980 F.2d 478, 487 (1992).

The court of appeals' decision is in conflict, however, with decisions of the Sixth Circuit, which hold that state rules of decision should govern successor liability under CERCLA. *City Management Corp.* v. *U.S. Chemical Co.*, 43 F.3d 244, 250 (6th Cir. 1994); *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991) (Kennedy, J., concurring). The court of appeals' decision is also in tension with a decision of the Eleventh Circuit, which holds that state rules of decision govern limited partner liability under CERCLA. *Redwing Carriers* v. *Saraland Apts.*, 94 F.3d 1489, 1500-1502 (11th Cir. 1996).[7]

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[6] The successor liability issue is currently before the Ninth Circuit again in *Atchison, T. & S.F. Ry.* v. *Brown & Bryant, Inc.*, No. 96-15529 (argued May 8, 1997).

[7] Petitioners suggest (Pet. 10-11) that the court of appeals' decision is also in tension with cases involving parent corporation liability under CERCLA. Those cases, however, involve the distinct question—and a separate conflict among the courts of appeals—over whether a parent corporation that actively participates in and exercises control over the day-to-day business of a subsidiary may qualify as an operator of the subsidiary's facility. The Michigan Department of Environmental Quality (MDEQ) and the United States have separately

2. Although there is a conflict among the courts of appeals on the issue presented here, review by this Court is not appropriate at this time. First, the court of appeals' decision in this case is interlocutory and there are no exceptional circumstances calling for its immediate review. Second, the decisions below do not provide an adequate factual record for the Court to conduct a meaningful inquiry into the differences between the proposed standards and the practical consequences of applying one standard rather than the other in the context of the federal liability scheme. Third, the lower courts should be given an opportunity to consider the recent rulings by this Court on related issues, which may affect the persistence of the conflict or clarify the precise points of disagreement among the lower courts.

a. Review is inappropriate at this time because the petition seeks review of an interlocutory order remanding for further proceedings. The Court ordinarily does not grant a writ of certiorari to review interlocutory decisions of the courts of appeals. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). It takes that step only in the "exceptional case" in which the Court's involvement "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). Accord *Hamilton-Brown Shoe Co.* v. *Wolf*

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petitioned for a writ of certiorari in a case raising that issue. See *United States* v. *Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997), petitions for cert. pending, No. 97-296 (MDEQ petition filed Aug. 8, 1997) and No. 97-454 (United States petition filed Sept. 10, 1997). See p. 8, *supra*.

Brothers & Co., 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree," and the absence of a final judgment may "of itself alone furnish[] sufficient ground for the denial of the application").

This Court's recent decision in *Mazurek* v. *Armstrong*, 117 S. Ct. 1865 (1997) (per curiam), illustrates that principle. That case arose from an interlocutory court of appeals decision that had rendered unenforceable a Montana statute allowing only licensed physicians to perform abortions. The Court noted that it is "ordinarily reluctant" to review an interlocutory decision, *id.* at 1868, but it concluded that the case presented exceptional circumstances warranting review because "the Court of Appeals decision is clearly erroneous under our precedents," "the lower court's judgment has produced immediate consequences for Montana," and it "has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements." *Ibid.* This case does not present a comparable situation. The court of appeals in this case merely vacated a grant of summary judgment to several private parties in an ongoing suit. It decided an issue that this Court has not yet had occasion to address, and it applied a standard that is followed by a majority of the courts of appeals that have addressed the question.

The concerns that underlie the Court's ordinary reluctance to grant interlocutory review apply with special force in this case. Petitioners are only two of a large number of parties in the complex ongoing litigation, which addresses complicated claims and liability relationships respecting responsibility for cleanup of two related hazardous waste sites. The

litigation remains at a preliminary stage with respect to threshold questions of liability. The court of appeals reviewed 85 separate summary judgment decisions, most of which will require further proceedings on remand. Those remand proceedings are likely to clarify and narrow the remaining claims, including the liability claims against petitioners. See Pet. App. 49a-62a. If the Court grants review at this time, it will disrupt the progress of the case, which may ultimately be resolved in a way that obviates the need for this Court's review. See *American Constr.*, 148 U.S. at 384 ("many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters").

It is significant in that respect that, while the court of appeals vacated all grants of summary judgment that had been premised on the absence of successor liability, only NRS and ZDC have petitioned for certiorari at this interlocutory juncture. The other parties that are potentially liable on a successor liability theory have elected to go forward in the remand proceedings. See notes 4-5, *supra*. There is no warrant for bifurcating the treatment of the similarly situated parties. Rather, both petitioners and the non-petitioning parties should follow the normal course of appellate procedure. They can preserve their objections, appeal from any adverse final judgment on remand, and, if necessary, seek review from this Court at a later date. See *Hamilton-Brown Shoe*, 240 U.S. at 257-259; *Virginia Military Institute* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of a writ of certiorari); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993).

b. The decision below is unsuitable for review by the Court at this time because it is not only interlocutory, but it also does not yet provide an adequate record for resolution of the successor liability issue. As noted above, the district court imposed significant restrictions on discovery in this case and granted summary judgment on successor liability without allowing any substantial development of the underlying facts. See pp. 5-8, *supra*. The sparse factual development in this case is relevant to the Court's exercise of discretionary jurisdiction for two reasons.

First, as the court of appeals indicated, the resolution of successor liability issues in this case will require additional factual development regardless of the standard employed. The court of appeals rejected challenges to the district court's restrictions on discovery, Pet. App. 29a-31a, but it instructed that, on remand, "[s]hould any material facts remain genuinely disputed, summary judgment should not be granted," *id.* at 49a. In the case of NRS, the court of appeals specifically stated:

> NRS's contention that it was not a successor to Norwalk Refuse Service (Norwalk), but only purchased some commercial customer routes, equipment, and containers from Norwalk presents a fact question regarding successor liability.

Id. at 50a. In the case of ZDC, the district court itself acknowledged that the factual record respecting this company was limited. *Id.* at 82a. Further factual development on remand may resolve the questions of successor liability and obviate the need for further review in this case. For example, discovery may reveal that petitioners are not successors under any

theory of successor liability. If the Court were to undertake review without allowing additional factual development, its review might effectively result in an advisory opinion.

Second, further factual development is necessary to provide an adequate basis for the Court to evaluate meaningfully the issue that petitioners pose in this case. The Court exercises its Article III functions by deciding discrete controversies among the parties. As the Court has stated in the context of disputes over standing, it decides those controversies "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

The Court's observation in *Valley Forge* is pertinent not only to the question of standing, but also to the Court's discretionary exercise of its certiorari jurisdiction. The Court should be reluctant to review an interlocutory order if the parties have not yet engaged in sufficient factual development to enable the Court to evaluate realistically the consequences of its decision, which is likely to have conclusive nation-wide consequences. In our view, the record in this case is inadequate for the Court to conduct a thorough inquiry into the question of successor liability. The absence of a fully developed record and specific findings would hamper the Court in its analysis of the practical differences between the proposed standards and the actual consequences of applying

one standard rather than the other in the CERCLA context.[8]

c. Petitioners contend that the circuit conflict has created "unacceptable" uncertainty on an "important and recurring" issue. See Pet. 15-22. We believe, however, that petitioners have overstated the need for immediate resolution of the question. Although the question of successor liability does arise in CERCLA litigation, it presents a less pressing issue than the question of parent corporation liability, which has also produced a conflict among the courts of appeals. The Michigan Department of Environmental Quality (MDEQ) and the United States have each filed a petition for a writ of certiorari on that issue in a case that provides a fully developed factual record for this Court's review. See *MDEQ* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-296 (filed Aug. 8, 1997); *United States* v. *CPC, Int'l, Inc.*, petition for cert. pending, No. 97-454 (filed Sept. 10, 1997). The Court should resolve the question of parent corporation liability first before addressing the question of successor liability.

Moreover, to the extent that petitioners are correct that this Court's decisions in *Atherton* v. *FDIC*, 117 S. Ct. 666 (1997), and *O'Melveny & Myers* v. *FDIC*,

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[8] The district court did not conduct an inquiry into the facts relevant to the application of either the "substantial continuity" test or the "identity" test with respect to NRS or ZDC. See Pet. App. 79a, 82a. The district court granted summary judgment without examining, for example, the specific facts respecting the corporate history and character of NRS and ZDC, or the facts relevant to the appropriate choice of law. The district court has not, of course, had an opportunity to develop a record for determining successor liability under the court of appeals' standard.

512 U.S. 79 (1994), provide guidance to the lower courts respecting the propriety of a federal rule of successor liability (Pet. 13-15), the Court should allow the lower courts and the affected parties an opportunity to reconsider and refine their views in light of that intervening authority.[9] That approach will either eliminate the conflict or clarify the precise contours of and the basis for the disagreement, which will aid this Court if it determines that review is warranted. If the issue proves to present a truly important and recurring source of confusion, there will be more appropriate opportunities, involving final decisions and fully developed records, to resolve the matter.

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[9] As petitioners point out (Pet. 8), all of the courts of appeals decisions applying a federal rule of CERCLA successor liability, except the decision in this case, were rendered before this Court's decisions in *Atherton* and *O'Melveny & Myers*. In this case, petitioners' briefs did not bring the *O'Melveny & Myers* decision to the court of appeals' attention until their petition for rehearing. This Court did not decide *Atherton* until after petitioners had filed their petition for rehearing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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